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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANTHONY C. KOVIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I.

The Court of Appeals and the District Court's denial of relief under a 28 U.S.C. §2255 petition was against the manifest weight of the evidence, and an abuse of discretion.

II.

Sentence was not imposed on accurate information in violation of the due process clause.

III.

The Court placed the Defendant in the classic Hobson choice.

IV.

Defendant was deprived of effective assistance of counsel throughout his former counsels' representation.

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NO.

IN THE

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October Term, 1987

ANTHONY C. KOVIC,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1254. The Court of Appeals for the Seventh Circuit had appellate jurisdiction under 28 U.S.C. Section 1291. The District Court had subject matter jurisdiction under 28 U.S.C. Section 2255.

OPINIONS BELOW

The Seventh Circuit affirmed the District Court's 28 U.S.C. Section 2255 petition on September 17, 1987. On September 18, 1986, the District Court denied 28 U.S.C. Section 2255 petition and a timely Notice of Appeal was filed.

I.

STATEMENT OF THE CASE

The defendant was found guilty of being in violation of one count of the Hobbs Act, 18 U.S.C. §1951 and seventeen counts of mail fraud, 18 U.S.C. §1341. The defendant, Mr. Kovic was at one time the highest ranking civilian employee with the Chicago Police Department. In that public position of trust, chief of the motor maintenance division, he participated in an ongoing fraudulent billing scheme that was demonstrated to net over $600,000 in excessive vehicle repairs. The sentencing court imposed the maximum term authorized under the Hobbs Act, twenty (20) years.

Approximately five years after the date the maximum twenty (20) year sentence was imposed, and subsequent to the date of same trial court's denial post-trial relief, Rule 35 motion relief and the

Court of Appeals affirmation of the trial court's denials, the identical sentencing court became aware that the presentence report had contained both material inaccuracies and undisclosed information. First, he had been described as being arrested for robbery in 1948, and secondly, that the defendant was unemployed and living off of his personal savings. The complete opposite was true, the defendant had never been arrested for robbery in 1948 or any other calendar year and in reality, he had become recently employed, four (4) days prior to the date the sentence was imposed. The district court summarily denied relief under the 28 U.S.C. §2255 petition based on this particular trial court's steadfast sentence policy, adopted over the years, that never considered arrest records of defendants nor did it consider, as in this case, a defendant

being unemployed on the date that sentence was imposed. The defendant's 28 U.S.C. §2255 petition raised the issue of the district court's demonstrated lack of discretion in its sentencing policy, which adamantly did not consider all the aspects of the particular crime and the defendant's background. In only one aspect did the Court of Appeals disagree with a district court's finding for a denial, the court declared that it was not error to be unable to amend in writing a presentence report that did not reflect a recent change in the employment status, since the logistics of dictating, typing and further amendment were logistically impossible.

The main issue raised was never addressed by the respective lower courts, the original twenty (20) year determination was imposed entirely without the benefit of the sentencing

court taking into account, the then undisclosed positive mitigating factors, regards the defendant's financial and criminal background, that he was then not just employable but in fact was then and there employed and had an exemplary non-criminal background.

The 28 U.S.C. §2255 petition raised the inability of the defendant to speak out for himself on the date sentence was imposed. The silence was attributed to the defendant being faced with the classic Hobson choice, elect to speak and (1) waive his Fifth Amendment right against self-incrimination; (2) waive his Sixth Amendment right for relief under post-trial motions and direct appeal of his conviction and lastly, subject himself to further criminal prosecution for obstruction of justice and perjury.

Defendants, even convicted defendants, have the Due Process Right to be sentenced on the basis of accurate

information, and in addition, Rule 32 and the Due Process right to be able to exercise their right to allocution at their sentencing without being assessed with both Fifth and Sixth Amendment constitutional waivers in the case where the cause of these constitutional errors are the result of yet another Sixth Amendment deprivation, ineffective assistance of counsel. The Court of Appeals avoided the issue of 'cause' by erroneously determining that the defendant had somehow not suffered "actual prejudice" by his former counsel's failure to: (1) investigate the accuracy of the presentence report; (2) have a conference with his own client to discuss the contents of the report, instruct his client on how to orally respond to the courts' and governments' upcoming inquiry of the defendant at sentencing, and provide him with a copy

of the report; (3) former counsel's failure to contest the inaccuracies and present actual mitigation on his client's behalf, raise the issues available then, but raised subsequently in defendant's now 28 U.S.C. §2255 petition. The §2255 issues were never raised either on direct appeal of his conviction or at the Rule 35 motion or appeal of same; and (4) failure to intercede and protect his client against
the sentencing court's coercement of his client on the date the maximum twenty (20) year sentence was imposed.

This Petition followed.

REASONS FOR GRANTING THE WRIT

I.

THE APPELLATE AND DISTRICT COURT'S DENIAL OF RELIEF UNDER THE 28 U.S.C. §2255 PETITION TO VACATE OR SET ASIDE THE TWENTY (20) YEAR SENTENCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AN ABUSE OF DISCRETION

A.

THE DISTRICT COURT'S IMPOSITION OF THE MAXIMUM SENTENCE DEMONSTRATED NO EXERCISE OF DISCRETION, EITHER AT THE SENTENCING HEARING, MAY 7, 1981 AND IN THE DETERMINATION OF THE DENIAL OF RELIEF UNDER THE 28 U.S.C. SECTION 2255 PETITION

The Court of Appeals adopted the original district court's May 7, 1981 sentence determination rationale, (App. at 15)

> "Mr. Kovic, I am not going to make a speech. I find the crime of which you are convicted to be a very serious crime against the public. I am taking into account the recommendations of the other judges on the sentencing council. I have taken into account the probation department's recommendations, the Government's recommendation, your counsel's argument on your behalf, and I sentence you to a period of 20 years and a maximum fine of $27,000."

In actuality the original district court sentence determination rationale was based on punishment of the crime solely to deter similar criminal activity by the imposition of a "substantial sentences" (App. 16). The reference that other parties actually entered into the district court's sentence determination is illusory, "the recommendations of the other judges on the sentencing council." is meaningless, since the sentencing councils' recommendation was based on the identical erroneous material misstatements about a 1948 arrest and unemployment that went unrefuted in the presentence report and never did consider the positive mitigating factors of employment and a non-criminal history record. If the previous convened Sentencing Council had been made aware of the existence of the two erroneous statements and the then advised of the

existence of the mitigating factors of both new employment and an exemplary non-criminal background, this would have contributed to a different judicial recommendation and adoption by the sentencing court on May 7, 1981. In addition, the Probation Department basis of recommendation had the identical underlying basis, and if corrected, would have resulted in a different recommendation for purposes of imposing sentence on May 7, 1981.

Former counsel failed to advise the original sentencing court that in mitigation it should consider the clients new employment status, and correct the district court's misconception, that he was not employed and living off his ill-gotten gains, the life savings.

The Government's argument to the court was identical to the sentencing court's reasoning, "...I find the crime

of which you are convicted before me to be a very serious crime against the public." (App. 15).

The district court avoided further use of the supposed meaningful sentence advisors, the Sentencing Council, Probation Department and obviously the defendant's former counsel in its Memorandum and Opinion and Orders' a determination to deny any relief requested in the 28 U.S.C. Section 2255 petition.

B.

THE DUE PROCESS CLAUSE AND THE FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 32 REQUIRE THAT THE SENTENCING COURT EXERCISE DISCRETION

The Second Circuit clearly enunciated Mr. Kovic's argument now on the sentencing court's failure to exercise any discretion in United States

v. Brown, 470 F.2d 285, 287 (2nd Cir. 1972), "Appellant's chief argument on appeal is that the judge never exercised discretion as contemplated by Fed.R. Crim.P. 32(c)(2) and the Due Process Clause."

The Rule in part reads:

> "The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence ..."

In the Kovic case, lack of discretion was demonstrated by the district court claiming a steadfast sentencing philosophy, adopted over the years that summarily disregarded the surrounding circumstances of a convicted defendant's background, such as: (i) "prior criminal record", the criminal arrest record in 1948 for robbery; (2) "financial conditions", "unemployed...supported by his personal

savings." (App. 11) The district court concluded, "In sum, the Court was not influenced by the erroneous information." (App. 17).

The Seventh Circuit's former standard required an individualized sentencing procedure that required a district court to be in possession of as many facts as it could in order to make a meaningful determination. In United States v. Harris, 558 F.2d 366, 372 (7th Cir., 1977), "In determining an appropriate punishment, all the circumstances of the particular crime and the background of the individual must be considered. This individualized sentencing process requires 'possession of the fullest information possible concerning the defendant's life and characteristics.' Williams v. New York, 337 U.S. 241, 247, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).

The Supreme Court has now allowed facts collected through hearsay to be used in the determination process. United States v. Tucker, 404 U.S. 443, 446, 92 S.Ct. 589, 30 L.Ed.2d 592, (1972). "Out-of-Court" information relative to the circumstances of the crime and to the convicted person's life and characteristics. Williams v. Oklahoma, 358 U.S. 576, 584, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959).

C.

FAIRNESS OF THE SENTENCING COURT

The Seventh Circuit has held, "The fairness of the sentencing process is undermined by reliance upon inaccurate information, not by the sentencing judge stating that he relied upon material which proves to be inaccurate. In addition, the explicit reliance requirement simply encourages judges not

to disclose the factors considered in imposing sentence. While it is true that a trial judge is generally not obligated to give reasons for the imposition of a particular sentence, it is sometimes necessary and always advisable, to do so...(citations omitted). Accordingly, we should not adopt a rule which will have the natural and probable effects of encouraging trial judges to avoid giving reasons for sentencing decisions and diminishing the individual offender's confidence in the fairness and objectivity of a critical step in the criminal justice process.", Harris, supra, pp. 374-375.

The Court of Appeals acknowledges the defendant's claim that the erroneous information was a "...result of ineffective assistance of counsel." (App. 13). The Court of Appeals concluded that the defendant simply had failed to prove

that the sentencing court had relied on the inaccuracies, and never addressed by either the district court and Court of Appeals was the accurate information now set forth for the first time in the §2255 petition.

The defendant asserts that he has amply demonstrated that the material but erroneous statements are still contained in his report. The "cause" of the erroneous statements being contained in the report is directly due to his attorney's failure to investigate or conduct an interview with his client.

II.

SENTENCING JUDGE RELIED ON IMPROPER, UNRELIABLE INFORMATION OR FALSE INFORMATION IN EXERCISING HER DISCRETION IN IMPOSING SENTENCE AND A CONVICTED DEFENDANT HAS A DUE PROCESS RIGHT TO BE SENTENCED ON THE BASIS OF ACCURATE INFORMATION

The Court of Appeals noted that the district court in its §2255 denial had concluded, "There are two erroneous statements contained in the presentence report. The correct facts are that the defendant was not arrested in 1948 for robbery and he was employed at the time of sentencing" (App. 11). The district court, after noting that the now complained of errors were, infact, contained in the presentence report at the time sentence was imposed, simply concluded, "In sum, the court was not influenced by the erroneous information. (App. 13).

The Court of Appeals adopted the authority in United States v. Frady, 456

U.S. 152 (1982) in its own rationale, "it is now the well established rule of the circuit that a federal prisoner seeking §2255 review of trial and on direct appeal, in a Rule 35 motion or on appeal of the Rule 25 motion, must establish cause and actual prejustice resulting from the failure to previously raise the constitutional issue." (App. 7).

The former counsel's argument raised at the post-trial conviction stage and then alter on direct appeal of the conviction, consisted entirely of, "...prejudicial joinder...and attacking the sufficiency of the evidence. We (Court of Appeals) affirmed the conviction." (App. 2)

Former counsel then presented a Rule 35 motion, which set forth as its basis, "...(1) Kovic was in poor health and was suffering from life threatening diseases; (2) conditions in the prison

were overcrowded; and (3) a plea for leniency. The (trial) court denied the (Rule 35) motion and former counsel filed an appeal, "...this court in an unpublished order affirmed (the trial court's denial), holding that the district court did not abuse its discretion in denying the Rule 35 motion." (App. 3, 4).

The defendant's lack of employment was also not taken into account. The defendant was caring for an ill, aged parent, and this fact adequately would have explained the defendant's unemployment. In sum, the court was not influenced by the erroneous information. (App. 13)

The district court concluded that the two material errors, (1) false criminal record, a 1948 arrest for robbery, and (2) the wrong financial information, unemployed as of the date

the sentence was imposed, due to the trial court's adoption of the false rationale that said unemployment was due to defendant's caring for an ill, aged parent were not taken into consideration for purposes of determining the type of punishment to be imposed. The district court and the Court of Appeals in their §2255 determinations failed to address the issue raised that, at the actual time the original maximum twenty (20) year sentence was being determined, the sentencing court, "...failed to consider his actual employment as a mitigating factor in imposing sentence." (App. 14).

A.

THE APPELLATE COURT ERRONEOUSLY DETERMINED THAT THE PETITIONER HAD SUFFERED NO 'ACTUAL PREJUDICE' RESULTING FROM BOTH THE INACCURATE AND INCOMPLETE PRESENTENCE REPORT

The Court of Appeals, summarily declared that it was unnecessary for it to determine the establishment of "cause"

for the procedural defaults complained of because the Court's own review demonstrated that no "actual prejudice" could be shown resulting from "the inconsequential inaccurate statements 1/

1/ It is important to note that Kovic asserted that the presentence report was both incorrect and most importantly, incomplete, in that, the report had failed to include an up-to-date fact at the time sentence was imposed, that Mr. Kovic was gainfully employed. U.S. v. Kovic, Id. at p. 14. Thus, the sentencing court based its decision, impart on an incomplete report.

contained in his presentence report." United States v. Kovic, No. 86-2617 (Sept. 17, 1987) at p. 9.

Initially, the court noted that the petitioner claimed that his presentence report contained no less than two erroneous statements. "The current facts are that the defendant was not arrested in 1948 for robbery and he was employed at the time of sentencing.

After reviewing the record, we agree with Judge Getzendanner that the presentence report contained in accurate information regarding a 1948 robbery arrest." United States v. Kovic, No. 86-2619, p. 11 (Seventh Circuit - September 17, 1987). The petitioner disagrees with the Seventh Circuit's conclusion at p. 11 that, "However, we cannot agree with her finding that the presentence report included erroneous employment information." The Court of

Appeal's supporting reasoning noted: "On May 31, 1981, thirteen days after the report had been completed and only four days before his sentencing hearing, Kovic obtained employment. Under these circumstances we hold that the presentence report was not inaccurate because neither courts nor defendants can reasonably expect that a presentence report can be prepared, dictated, typed and presented to the court contemporaneous with the sentence hearing." Rather, it is incumbent upon counsel to examine and review the report with their clients and notify the court at the sentencing hearing of the defendant's changed circumstances, if any. Any accurate employment information included in Kovic's presentence report as of May 7, 1981, the date of the sentencing, is there because of the defendant's and/or his counsel's failure

to object, and not due to the fault of the trial court or the U.S. Probation Department. " ... "The sentencing transcript disclosed that Judge Getzendanner posed the following question to defense counsel:

> "First let me inquire of defense counsel you have each had an opportunity to review the presentence report with respect to your client? Has anybody not had the opportunity? All right."

Inasmuch as defendant's counsel knowingly chose not to verbally respond to the court's inquiry, his failure to respond, as much as any direct response, convinces us that counsel had an opportunity to review the presentence investigation report." Id. at p. 12.

The Court of Appeals completely avoided the sworn testimony contained in defendant's 28 U.S.C. §2255 petition citing constitutional reasons for not speaking at the time of sentencing.

The Court of Appeals looked at the sentence transcript which was silent and of no help in the determination of this issue.

The "actual prejudice" initially occurred at the time sentence was determined, and the imposition of the twenty (20) year maximum sentence was not made by a sentencing court that had as its underlying basis accurate information in order for it to arrive at a meaningful determination. The defendant should have been sentenced on the basis of accurate information as guaranteed by the Due Process Clause. United States v. Tucker, 404 U.S. 443, 447 (1972). The fact that the sentencing court was not influenced by the reports' erroneous information is immaterial and does not obviate the criticisms, that accurate information was not taken into account in any manner by the sentencing court in its formulation

of a sentence or other punishment to be imposed.

The cause of the inaccurate information not supposedly relied on and the accurate information not being included in the presentence report is due to ineffective assistance of counsel. It is uncontested that former counsel failed in his duty at the time of sentencing to investigate the accuracy of the presentence report. The material inaccuracies were neither contested nor corrected nor even considered.

III.

THE COURT COERCED DEFENDANT TO ENTER INTO THE PLEA BARGAINING PROCESS WITH THE GOVERNMENT IN OPEN COURT ON THE DATE SET FOR DEFENDANT'S SENTENCING AND PRESSURED DEFENDANT TO COOPERATE WITH THE GOVERNMENT TO PROVIDE THE IDENTITY OF THE MAN DESIGNATED AS THE "MAN DOWNTOWN" WHICH IS PROHIBITED BY FEDERAL RULE CRIMINAL PROCEDURE 11(e)(1)

The sentencing transcript reveals that the sentencing court on its own, without any prompting, directed an inquiry aimed at the defendant, concerning his participation in other criminal acts, he had not been convicted in 80 CR 499. The sentencing court made an in-depth inquiry as to the opportunity the defendant had in providing the government with the identity of the "man downtown".

> THE COURT: I recall particularly the testimony that Mr. Kovic referred to the man downtown and having to share 10 percent of the profits which would be raised and fraudulent billings with the man downtown.

May I ask the government if they have conducted an investigation to determine who the man downtown is.

GOVERNMENT: Your Honor, we are anxious to know who the man downtown is. It seems to me there is only one person who can easily resolve that problem as to whether or not there is a man downtown. I have no firm evidence, but it seems to me based on this case and the previous case..." ..."but it is my opinion that based on the monumental amounts of money that Kovic was collecting from nearly every vendor we have investigated, it is my opinion that he had to share some of it with somebody or somebodies.

THE COURT: Was Mr. Kovic given the opportunity to cooperate with the government with respect to the man downtown?

GOVERNMENT: He has been given the opportunity to cooperate.

FORMER COUNSEL: That is not true.

GOVERNMENT: He can stand up here right now and we will hear who the man downtown is.

FORMER COUNSEL: I will answer you.

GOVERNMENT: Do it now.

THE COURT: No. No. He will respond.

In Thomas v. United States, 368 F.2d 941, 945 (Fifth Cir. - 1966), the

Appellate Court noted, "It must be remembered that, at the time of his allocution, Thomas had not been finally guilty. Still open to him were the processes of motion for a new trial (including the opportunity to discover new evidence), appeal, petition for certiorari and collateral attack. Indeed, appeal is now an integral part of the trial system or finally adjudicating the guilt or innocence of a defendant."

A.

IMPROPER PRESSURE AND COERCEMENT

The date sentence was imposed, the court, without request from either the government or the defense, joined forces with the government under a Rule 11 setting. The court inquired as to whether Mr. Kovic had been provided with an opportunity to cooperate by providing

the government with the identity of the so-called "man downtown". A criminal act that defendant had never been indicted for, convicted of and was scheduled to appear only on that date for imposition of sentence on his jury conviction in 80 CR 499.

> FORMER COUNSEL: Then I am sure glad he didn't take the stand.
>
> THE COURT: It flies in the face of the evidence.

It is uncontroverted in the record of the 28 U.S.C. 2255 proceeding, as evidenced by the defendant's sworn statements, contained in the defendant's affidavit. (Vol. II, 287, Ex. b., pp. 18-20, 25).

Fifth Amendment:

> (MR. KOVIC). (1) I remained silent because I could have been subject to receive additional criminal charges based on the judge's remarks that she would not believe me if I denied any knowledge of the person Mr. Nawrocki referred to me as the "man

downtown." (Vol. II, 381, Ex. 2, p. 4).

Sixth Amendment:

(MR. KOVIC). (2) I remained silent because I was appealing my conviction in 80 CR 499 and was not provided with a grant of immunity. At the time of sentencing, I did not possess any knowledge or skill in the field of law and totally depended on my attorney for legal assistance.

(3) I was not afforded any advice on how to deal with this conflict at my sentence hearing which my attorney was aware would be raised by the government. (Vol. II, 381, Ex. 2, p. 4).

The Court of Appeals arrived at its decision to deny the issue of coercement by the district court. The review was limited to only the sentence transcript itself, which reflects actual silence on the defendant's part, and the court should have taken into consideration the underlying reasons for his silence as enunciated by the defendant's sworn testimony contained in 28 U.S.C. §2255 petition.

IV.

DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO AND ON THE DATE SENTENCE WAS IMPOSED THROUGH THE APPEAL PROCESS

A.

FORMER COUNSEL HAD A DUTY TO PREVENT COURT FROM PROCEEDING ON FALSE ASSUMPTIONS

In Townsend v. Burke, 334 U.S. 736, 740, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948) determined that, "Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere..." In the instant case, former counsel failed to advise the court that it was considering false assumptions in arriving at and making its determination of the appropriate sentence to be imposed. The

report's false information, "...the defendant had been unemployed. Mr. Kovic advised that he is supported by his personal savings, (App. 11) and the sentencing court's own misplaced rationale, "The defendant was caring for an ill, aged parent, and this fact adequately would have explained the defendant's unemployment." (App. 13) In addition, the sentencing court was unable to take into account the new employment status in its determination of an appropriate sentence.

The Supreme Court noted in United States v. Tucker, 404 U.S. 443, 448, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), the real question is, "...whether the sentence in the 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained.", or

would the sentence have been different if the District Court had been correctly informed.

Former counsel's failure to act in accordance with minimal acceptable standards deprived the defendant of being provided with a meaningful argument in mitigating the commission of the crime.

The "actual prejudice" continues effective as of today, in that the erroneous contained information concerned with the prisoners' criminal record and surrounding financial circumstances adversely effects his place of incarceration, eligibility of being released and paroled. United States v. Baynes, 687 F.2d 659, 668-69 (3rd Cir. - 1982); Eldridge v. Atkins, 665 F.2d 228, 236 (8th Cir. - 1981). Eldridge v. Atkins, 665 F.2d 228, 236 (8th Cir. - 1981); Strickland v. Washington, 104 S.Ct. 2052, 2067 (1984).

The principal function at the time the presentence report was to be used at sentencing and evaluation by the Federal Bureau of Prisons was defeated. The principal function of the presentence report is to assist the court in its determination of the appropriate imposition of a sentence. The other function that a presentence report provides, which in operation now, is that it "...assist(s) (prisoner classification and early release decisions) the Federal Bureau of Prisons and the United States Courts" United States v. Charmer Industries, Inc., 711 F.2d 1164, 1170 (2nd Cir. - 1983). The defendants' erroneous, inaccurate and incomplete report, "...is a court document and is to be used by non-judicial federal agencies." Id. at 1170.

It is evident that documents were

readily available to former counsel so that he could contest the material inaccuracies and incompleteness. (Defendants' original application with City of Chicago, Ex. A, reinvestigation by Probation Department, Ex. B, Cook County Credit Bureau. Check and Cook County Probation Department, Ex. No. 5, defendants' 28 U.S.C. §2255 Petitioner's Affidavit. (Vol. II, 381).

The clearest example of another defendants' attorney's breach of a prescribed duty to investigate, appears in Gaines v. Hopper, 575 F.2d 1147, 1149 (5th Cir. - 1978). The counsel "...did not have a proper understanding of his clients' case, if he had interviewed the witnesses listed on the grand jury indictment instead of relying completely on the prosecuting attorney and law enforcement officers..." "...(since he had not investigated) Gaines trial

counsel did not fully consider the possibilities of his clients case and could not have done so because he had not set about to learn the facts from witnesses. As a result, he was in no better position than his jailed client to evaluate the legal and factual realities of the case, ..." Id. at p. 1149.

The Supreme Court has agreed, "... that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. Strickland v. Washington, 466 U.S. 668, 680, 104 S.Ct. 2052, 80 L.Ed. 674, (1984). The former counsel failed to investigate, "...there can be no strategic choice that renders such an investigation unnecessary." Id. at 680. "Among the factors relevant to deciding

whether particular strategic choices are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense." Id. at 681.

The Supreme Court concluded at p. 682, "The specified showing of prejudice would result in reversal of the judgment, the Court concluded, unless the prosecution showed that the constitutionally deficient performance was, in light of all the evidence, harmless beyond a reasonable doubt. (emphasis added)

B.

FORMER COUNSELS COMPETENCY REQUIRED THE DUTY TO RESPOND

The petitioner agrees with the Appellate Court's findings and determination that Kovic's former counsels "... knowingly chose not to verbally respond to the court's inquiry,

his failure to respond, as much as any direct response, convinces us that (former) counsel had an opportunity to review the presentence report." Id. at p. 12. In Riley v. Wyrick,, 712 F.2d 382, 385 (Eighth Circuit - 1983), the court was squarely faced with the issue of why defense counsel at trial had failed to make a timely objection to the admission of the contraband heroin.

The court in Riley noted, at p. 385, "... When defense counsel has a plausible strategic reason for failing to object, we are reluctant to second-guess such a tactical decision." The court then determined, "... We can see no reasonable basis for O'Herin's tactical decision not to object at trial to the admission of the heroin."

Former counsel had a duty to advise the district court of both the inaccuracies contained within the report

itself and in completeness of the report, in that, it failed to contain positive information about petitioner's recent employment in private industry. Former counsel failed to execute his duty prior to and on the date the sentence was imposed. The sentencing court was not advised of the true facts and circumstances.

The Court of Appeals alludes to in its rationale that former counsel could not delegate its duty to the United States Probation Department, the primary responsibility laid with former counsel.

C.

IN OPEN COURT AND ON THE RECORD FORMER COUNSEL'S DUTIES WERE REITERATED ON THE DATE AND TIME SENTENCE WAS IMPOSED

Counsel for co-defendant Mr. Faul, Attorney Brody, on the identical date and time Kovic's sentence was imposed,

advised the sentencing court, "I read the presentence report, judge, and there are some errors and inaccuracies there that I would like to call to your Honor's attention.

> THE COURT: All right.
>
> MR. BRODY: I think that is my duty.
>
> THE COURT: It clearly is. (Emphasis added)
>
> THE COURT: I think it is clear error in the report and I would you to submit a formal request to me to correct that in writing" ... "because you know these presentence reports follow the defendants. They go to the Parole Commission. The Parole Commission makes the determination with respect to parole BASED ON THE INFORMATION CONTAINED HEREIN, AND IF IT IS ERROR, IT MUST BE CHANGED." (Emphasis added, full transcript of sentence hearing on May 7, 1981 at p. 51). Co-counsel noted explicitly his other duties owed to his client prior to sentencing.
>
> (MR. BRODY): ... Naturally I consulted with my client. I investigated (Id. at p. 60). The full transcript, at p. 64, depicts expected competency demonstrated by other defendant' counsel at the time of sentencing,....

MR. CARMELL: Your Honor, I would like to address three points, the first being the presentence investigation report... As noted in our sentencing memorandum, the government concedes that there was strategic error, a significant error in the way the changes are against Mr. Faul. 3/ Id. at p. 65.

THE COURT: (Id. at p. 76) All right ... Mr. Faul, the court by the way, with respect to the errors in the presentence report, it is important to have those formally corrected. Whatever it takes to formally correct it, we should do." ... IT IS IMPORTANT TO HAVE IT (Defendant's presentence report) ACCURATE." (Emphasis added).

THE PROBATIONARY OFFICER: Was there error, your Honor? I didn't hear about the error.

THE COURT: The error is in the government's description ...

3/ Needless to say Kovic's counsel never provided the court with a sentence memorandum.

D.

ACTUAL CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant cites the following deficiencies of former counsel, that fall below an objective standard of reasonableness:

(i) Failure in his duty at time of sentencing to investigate the presentence report. United States v. Baynes, 687 F.2d 659, 668-69. (3rd Cir. - 1982); Eldridge v. Atkins, 665 F.2d 228, 236 (8th Cir. - 1981); Gaines v. Hopper, 575 F.2d 1147, 1149 (5th Cir. - 1978).

(ii) Failure to conduct an in-person conference with his client, to discuss the contents of the report, prepare affidavits, instruct his client on how to testify or respond to questions at sentencing (identity of man downtown subject never discussed), and provide a copy of report to his client.

(iii) Failed to contest material inaccuracies and provide for a completed report; failed to ask for a continuance or in any manner assist his client in open court with the Hobson Choice.

(iv) Failure to raise the issues addressed in this 28 U.S.C. §2255 petition in post-trial motions and on appeal of the conviction, the Rule 35 motion and appeal of its denial.

(v) Failure to assist and advise the client on how to respond in terms of mitigation. The mitigation argument made by counsel, based on the entire set of circumstances, was below acceptable professional conduct. United States v. Hodges, 547 F.2d 951 (5th Cir. - 1977); United States v. Stephens, 699 F.2d 534, 537 (11th Cir. - 1983); United States v. Van Drunen, 501 F.2d 1393, 1399, (7th Cir. - 1974); Green v. United States, 365 U.S. 301, (1961).

(vi) Failure to subpoena Mr. Nawrocki's secretary on the issue of the existence of the "man downtown".

(vii) Failure to object to the bargaining process, which is prohibited by Rule 11(e)(1).

(viii) Failure of counsel to object to courts' pressure to admit criminal involvement with crimes not indicted for or convicted of on that date.

(ix) Failure of former counsel, David Labell to seek prior defendant's authority to negotiate with the government at Rule 35 motion stage and appeal.

E.

PREJUDICE

The court in Strickland v. Washington, 466 U.S. 668, 690-91, (1984), "...the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions..." ... "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."

The court noted, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "The ultimate focus of inquiry must be on the fairness

of the proceeding whose result is being challenged." Id. at 696.

In Strickland, "The aggravating circumstances were utterly overwhelming." Id. at 699.

In Davis v. State of Alabama, 596 F.2d 1214, 1222 (5th Cir. - 1979), the appellate court has held that a conviction will be overturned based on evidence that, "... an attorney's failure to conduct an adequate investigation of possible defenses, and we believe that is decisive." ... "Usually it (an appellate court) need only examine the specific evidence that an investigation would have uncovered; it will determine how prospective witnesses will testify and whether certain tangible evidence exists. Affidavits, depositions or if necessary live testimony will be generally reliable and economical means of deciding the question."

Holtan v. Parratt, 683 F.2d 1163, 1166, 1170-1171 (8th Cir. - 1982), the court held that at P. 1166, "(e) by the failure of counsel to advise the court that Holtan wished to withdraw his plea of not contest to the charge of first degree murder after he had been advised by counsel that the penalty which the court probably would impose was the sentence of death." ... (at P. 1170) we also observe that as a result of Carey's failure to act on Holtan's request for withdrawal, Holtan was denied the opportunity even to present his request to the trial court."

The court concluded in United States v. Donn, 661 F.2d 820, 824 (8th Cir. - 1981) that "The government correctly points out that Donn waived his right to challenge to presentence report because he did not challenge it before sentencing. A defendant waives his right

to attack the presentence report through a Sec. 2255 motion when he fails to avail himself of an opportunity to do so contemporaneously or on direct appeal.

The appellate court in Holtan v. Parratt, 683 F.2d 1163 (8th Cir. - 1982), declared that ineffective assistance of counsel had been shown, in part, by defendant when he asserted, Id. at 1165, "(a) by the failure of his counsel to subpoena witnesses who could have presented mitigating factors at his sentencing hearing..." ... "(c) by the failure of counsel to investigate the case adequately, either through the taking of depositions, interviewing of witnesses, or reading the police reports in their entirety;" and other inadequacies.

The court concluded at p. 1170, "...We hold that Holtan has made an

adequate showing tha he was prejudiced..."

Id. at 1171. "This is not to say that prejudice always can be proved merely by showing that the petitioner has been denied a procedural device as a result of ineffective counsel. All we are saying is that where, as a result of ineffective assistance of counsel, a petitioner has been deprived of the opportunity (in this case) to request the withdrawal of his guilty plea...and where he has shown that there is a substantial probability that he would have succeeded in such a request, then an adequate showing of prejudice has been made."

CONCLUSION

The defendant has demonstrated to the court an adequate basis in the court record that the court, through its supervisory powers, grant the relief authorized under 28 U.S.C. §2255. The defendant asks that the court vacate the maximum twenty year sentence and resentence the defendant, instanter, or remand to a new district court for resentencing or any other relief the court deems fit and proper.

Accordingly, for all these grounds Anthony C. Kovic prays that a writ of certiorari issue to review the decision of the Seventh Circuit Court of Appeals in this case.

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2617

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY C. KOVIC,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 3834—**Susan Getzendanner**, *Judge.*

ARGUED FEBRUARY 11, 1987—DECIDED SEPTEMBER 17, 1987

Before WOOD, JR., COFFEY, and RIPPLE, *Circuit Judges.*

COFFEY, *Circuit Judge.* Anthony C. Kovic appeals the district court's denial of his petition to vacate or set aside his sentence pursuant to 28 U.S.C. § 2255. We affirm.

I

On February 26, 1981 a jury convicted Kovic of 17 counts of mail fraud in violation of 18 U.S.C. § 1341, and one count of knowingly and willfully affecting commerce by extortion, under color of official right (Hobbs Act), in violation of 18 U.S.C. § 1951. Kovic had been the chief of the Motor Maintenance Division, the highest ranking civilian in the Chicago Police Department. From this position of public trust, Kovic helped to initiate, organize and

promote a scheme which eventually bilked the citizens of Chicago of over $600,000 by fraudulently billing the Police Department for excessive repairs allegedly performed on damaged police department vehicles. Kovic's conviction resulted from his central role as the "kingpin" of this massive fraud against the City of Chicago. Kovic was sentenced to a term of 20 years imprisonment under the Hobbs Act; 20 years imprisonment under the 17 mail fraud counts, the latter to run concurrently with the Hobbs Act sentence; together with a fine of $27,000. These sentences were to run concurrently with a 12-year sentence previously imposed in a related case.

Kovic appealed his conviction represented by Attorney David P. Schippers, who also had been his trial counsel, claiming, *inter alia*, prejudicial joinder of defendants and attacking the sufficiency of the evidence. We affirmed the conviction.[1] Kovic chose to remain free on bond and began serving his sentence on January 3, 1983. On June 15, 1983, David Lubell,[2] on behalf of Kovic, made a Rule 35(b)[3] mo-

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[1] *United States v. Cavale*, 688 F.2d 1098 (7th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983) (Kovic's petition for a writ of certiorari was limited to questions concerning the admissibility of co-conspirators' statements and for severance).

[2] The Government states in its brief that on June 15, 1983, Lubell was a member of the Schippers firm. However, the record does not support this conclusion. While it is evident that there was a relationship between Lubell and Schippers, it is unclear whether Lubell was in fact a member of Schippers' law firm. Lubell, a member of the New York bar, apparently maintained a New York office. Furthermore, Kovic's affidavit reveals that Kovic retained a New York attorney to handle his Rule 35 motion and its subsequent appeal.

[3] On June 15, 1983, Rule 35 provided:

> (a) CORRECTION OF SENTENCE. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
>
> (b) REDUCTION OF SENTENCE. The court may reduce a sentence within 120 days after the sentence is imposed, or within

(Footnote continued on following page)

tion requesting a reduction of Kovic's 20-year sentence. The motion set forth that (1) Kovic was in poor health and was suffering from life threatening diseases, (2) conditions in the prison were overcrowded, and (3) a plea for leniency. The court denied the motion and Lubell filed an appeal.[4] On July 23, 1984, this court in an unpublished

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[3] *continued*

120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Effective November 1, 1987, Rule 35 in its entirety will be amended to provide as follows:

(a) CORRECTION OF A SENTENCE ON REMAND. The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court—

(1) for imposition of a sentence in accord with the findings of the court of appeals; or

(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

(b) CORRECTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. The court, on motion of the Government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court's authority to lower a sentence under this subdivision includes the authority to lower such sentence to a level below that established by statute as a minimum sentence.

[4] The record discloses that Schippers also made a motion to make Kovic's presentence report a part of the record on appeal from the denial of the Rule 35 motion.

order[5] affirmed, holding that the district court did not abuse its discretion in denying the Rule 35 motion.

On May 29, 1986, over five years after his sentencing, Kovic filed a petition to vacate or set aside his sentence pursuant to 28 U.S.C. § 2255, the federal prisoners' equivalent of a habeas corpus petition. Kovic asserted:[6]

> (1) That the district court relied on erroneous facts contained in Kovic's presentence report in imposing sentence violating Rule 32 of the Federal Rules of Criminal Procedure and Kovic's due process rights;
>
> (2) that the district court coerced Kovic to either cooperate with the Government and waive his right of appeal and privilege against self-incrimination or remain silent thereby incurring a harsher sentence;
>
> (3) that his counsel provided ineffective assistance of counsel by, *inter alia*, failing to preserve these said errors at sentencing or by failing to raise them subsequently.

The Government argued that Kovic had waived these arguments because he had failed to raise them either at sentencing, on direct appeal, at the Rule 35 motion or on his appeal from the Rule 35 motion. Because Kovic failed to show cause excusing his procedural defaults and actual prejudice resulting from the errors of which he complained,

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[5] *United States v. Kovic*, No. 83-2296 (7th Cir. July 23, 1984).

[6] Kovic's § 2255 petition contained eight assertions, some of which were redundant. His petition did, however, raise the following additional issues which he no longer pursues on this appeal:

> (1) that the district court, prior to sentencing, did not afford Kovic and/or his counsel an opportunity to comment as to the accuracy of the presentence report violating Rule 32(c)(3) and his due process rights;
>
> (2) that Kovic was denied his right to allocution violating his due process rights.

the district court denied Kovic's petition.[7] On appeal, Kovic asserts the above said errors and also contends that the district court abused its discretion when it (1) failed to provide an evidentiary hearing pursuant to § 2255, and (2) denied his § 2255 motion.

II

The Government has argued and Kovic does not dispute that the *Frady* cause and actual prejudice standard is applicable to Kovic's § 2255 assertions. In *United States v. Frady*, 456 U.S. 152, 167-68 (1982), the Supreme Court held that a federal prisoner seeking collateral relief pursuant to § 2255, "based on trial errors to which no contemporaneous objection was made, . . . must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." The Supreme Court noted two overriding reasons for the adoption of the cause and actual prejudice standard under these circumstances. Initially, the Court observed that the federal government has a significant interest in the finality of its criminal judgments. The Court stated that "[o]ur trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks. To the contrary, a final judgment commands respect." *Id.* at 164-65. Furthermore, we have noted that "the grant of a habeas writ is intended to be the exception, not the rule." *Sanchez v. Miller*, 792 F.2d 694, 698 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 933 (1987). The second important reason the Court alluded to is that federal prisoners, unlike their

[7] The court's order denying Kovic's § 2255 petition concluded that there was no cause or actual prejudice excusing Kovic's procedural defaults. The court initially decided that Kovic's claims were without merit. We agree with the decision of the trial court on a different basis; thus, we affirm. *See Rizzo v. United States*, 85-1984, slip op. at 4 (7th Cir. June 2, 1987); *see also Pfeil v. Rogers*, 757 F.2d 850, 866 (7th Cir. 1985).

state counterparts, have previously presented their federal claims in our federal trial and appellate courts. *Frady*, 456 U.S. at 166.

We adopted the *Frady* cause and actual prejudice standard in *Norris v. United States*, 687 F.2d 899 (7th Cir. 1982). In *Norris* we held that a federal prisoner's failure to raise a constitutional issue[8] on direct appeal bars raising it in a subsequent § 2255 motion unless the defendant can show cause for and actual prejudice resulting from the error of which he complained. *Id.* at 904. We noted:

> "To take an appeal, and as it were reserve several issues for a second appeal to be taken from the denial of a § 2255 motion after the first appeal is decided . . . is to engage in piecemeal litigation in as blatant a form as can be imagined. In some cases, there may be a good reason for this weird procedure—such as incompetence of counsel in the first appeal, newly discovered evidence, or an intervening change in the law—and if so the appellant will be able to demonstrate good cause for his failure to appeal the first time and will therefore be allowed to appeal a second time."

Id. at 903. We stated that there is a presumption against piecemeal litigation and it is the movant's burden to overcome the presumption by establishing cause for the procedural default and any actual prejudice resulting therefrom. *Id.* at 903-04.

In *United States v. Griffin*, 765 F.2d 677 (7th Cir. 1985), we reaffirmed the validity of *Norris*. In *Griffin* we held that a federal prisoner who failed to raise his multiplici-

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[8] Non-constitutional errors are not properly raised in a § 2255 motion because they could have been, but were not, raised on direct appeal. *Norris v. United States*, 687 F.2d 899, 900 (7th Cir. 1982); *See also United States v. Griffin*, 765 F.2d 677, 680 (7th Cir. 1985).

ty argument at trial and on direct appeal must show cause for and actual prejudice resulting from the error of which he complained before we would excuse his double procedural default. *Id.* at 682. We noted that "the rule propounded in *Norris* is that when a federal criminal defendant fails to argue an issue on direct appeal of his conviction, the failure to bring the issue on direct appeal bars raising that issue in a § 2255 motion unless good cause for not appealing is shown." *Id.* at 680. Furthermore, "[w]hen the cause and prejudice standard is applied, the defendant must satisfy both the cause and prejudice elements." *Id.* at 682; *Frady*, 456 U.S. at 168.

In *Williams v. United States*, 805 F.2d 1301, 1306-07 (7th Cir. 1986), we extended the applicability of the *Norris* cause and prejudice standard to new issues raised by defendants when attacking their sentences in a § 2255 proceeding. We noted that a defendant can attack his sentence in a Rule 35 motion and is free to appeal any adverse ruling on the Rule 35 motion by the district court. *Id.* at 1306. It is now the well established rule of this circuit that a federal prisoner seeking § 2255 review of issues which could have and should have been raised at trial and on direct appeal, in a Rule 35 motion, or on appeal of the Rule 35 motion, must establish cause for and actual prejudice resulting from the failure to previously raise the constitutional issue.

The Government argues that each of Kovic's § 2255 assertions are being raised for the first time and are thus subject to the *Norris* standard. Kovic asserts that his previous counsel provided ineffective assistance of counsel in that they failed to raise or preserve his constitutional claims; and that the ineffective assistance of counsel constitutes cause for Kovic's procedural defaults.[9] Kovic con-

[9] We have noted that ineffective assistance of counsel may provide sufficient cause for a procedural default. *See Clay v. Director of Juvenile Div., Dep't of Corrections*, 749 F.2d 427, 430 (7th Cir. 1984); *Norris v. United States*, 687 F.2d 899, 903 (7th Cir.

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tends that actual prejudice has resulted from his counsel's failure to timely raise the issues he now presents in his § 2255 motion; we address each issue separately.

A.

While seeming to cast aside the fact that he was the "kingpin" of a massive fraud on the citizens of Chicago, Kovic asserts that the sentencing court relied on erroneous and false information found in his presentence report as the basis for his 20-year concurrent sentences which were imposed on May 7, 1981. Specifically, he asserts that two erroneous statements are contained in his presentence report: (1) he was arrested in 1948 for robbery, and (2) he was unemployed at the time of sentencing. Kovic contends that the district court's reliance on these inaccurate statements in imposing his sentence violated his due process rights. The Supreme Court has held that convicted defendants have a due process right to be sentenced on the basis of accurate and reliable information. *See, e.g., United States v. Tucker*, 404 U.S. 443, 447 (1972). We too have had the opportunity to reaffirm the importance of the constitutional right to a fair sentencing procedure. *See, e.g., United States ex rel. Welch v. Lane*, 738 F.2d 863 (7th Cir. 1984); *United States v. Harris*, 558 F.2d 366 (7th Cir. 1977). Because Kovic's arguments raise the possibility of a violation of his due process rights, he is required to establish cause for and actual prejudice resulting from his failure to raise this issue prior to his § 2255 motion. As we noted in *Griffin*, the *Norris* standard requires that Kovic establish both cause for and actual prejudice resulting from his failure to raise the issues prior to his § 2255

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[9] *continued*

1982); *Johnson v. United States*, 805 F.2d 1284, 1291 (7th Cir. 1986). Furthermore, the Supreme Court stressed that only when counsel's performance is constitutionally ineffective under the *Strickland v. Washington*, 466 U.S. 668 (1984), standard will cause for a procedural default be found. *Murray v. Carrier*, 106 S. Ct. 2639, 2646 (1986).

petition. *See also Unites States v. Frady*, 456 U.S. 152, 168 (1982). We find it unnecessary to determine whether Kovic can in fact establish cause for his procedural defaults because from our review of the record we are confident he suffered no actual prejudice resulting from the inconsequential inaccurate statements contained in his presentence report.

The Supreme Court has refrained from giving "precise content" to the term "prejudice." Instead, the Court chose to let the facts presented in its future cases provide the "content" of the term "prejudice." *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). Subsequently, in *Frady* the Court had an opportunity to address the degree of prejudice a federal prisoner must establish before he could obtain collateral relief. There, the procedural default occurred when the defendant failed to timely object to a jury instruction at trial. The court stressed that before the prisoner could satisfy the prejudice element of the *Frady* test, he must establish that " 'the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.' " *Frady*, 456 U.S. at 169 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973))). The Court stated that:

> "[*Frady*] must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."

Id. at 170. The Court concluded noting that it perceived "no risk of a fundamental miscarriage of justice." *Id.* at 172. Therefore, we conclude that Kovic must demonstrate that the existence of the two alleged inaccurate statements in his presentence report[10] so infected his sentenc-

[10] Kovic initially asserted that the sentencing court relied on letters found in his file which in fact did not exist. Additionally, Kovic

(Footnote continued on following page)

ing hearing that it resulted in a fundamental miscarriage of justice.

A convicted defendant has a due process right to be sentenced on the basis of accurate information. *United States v. Tucker*, 404 U.S. 443, 447 (1972); *See also Townsend v. Burke*, 334 U.S. 736 (1948). We noted that:

> "Under *Townsend* and *Tucker*, a sentence must be set aside where the defendant can show that false information was part of the basis for the sentence. The two elements of that showing are, first, that information before the sentencing court was inaccurate, and second, that the sentencing court relied on the misinformation in passing sentence."

United States ex rel. Welch v. Lane, 738 F.2d 863, 865 (7th Cir. 1984); *see also United States v. Harris*, 558 F.2d 366, 373 (7th Cir. 1977) (wherein we stated: "*Tucker* and *Townsend* have been read broadly to preclude reliance upon 'improper or inaccurate information' in making the sentencing determination."). Thus, "in order to show a due process violation, [Kovic] must raise grave doubt as to the veracity of the information [contained in his presentence report] and show that the court relied on that false information in determining the sentence." *United States v. Eschweiler*, 782 F.2d 1385, 1387 (7th Cir. 1986). Only then can Kovic assert that a fundamental miscarriage of justice occurred at his sentencing hearing.[11]

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[10] *continued*
contended that the district court had relied on information contained in other presentence reports. Judge Getzendanner clearly refuted these allegations in her Memorandum Opinion and Order denying the § 2255 motion. Kovic does not raise these arguments on appeal; instead he argues that the sentencing court impermissibly relied on two inaccurate statements in imposing his sentence: (1) that he was arrested for robbery in 1948, and (2) that he was unemployed at the time of sentencing.

[11] Kovic additionally asserts that a violation of Fed. R. Crim. P. 32 occurred when Judge Getzendanner "relied" on false information in his presentence report. We note, however, that Kovic can-

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Kovic argues that Judge Getzendanner's findings in the September 18, 1986 Memorandum and Order establish that his presentence report contained two inaccurate statements. Judge Getzendanner noted:

> "There were two erroneous statements contained in the presentence report. The correct facts are that the defendant was not arrested in 1948 for robbery and he was employed at the time of sentencing."

After reviewing the record, we agree with Judge Getzendanner that the presentence report contained inaccurate information regarding a 1948 robbery arrest. However, we cannot agree with her finding that the presentence report included erroneous employment information. Our examination of Kovic's presentence report reveals that the report was completed by a U.S. Probation officer on April 20, 1981, in preparation for Kovic's May 7, 1981 sentencing hearing. The following employment information is found in the report completed April 20, 1981:

> "Since November 18, 1980, the defendant has been unemployed. Mr. Kovic advised that he is supported by his personal savings."

On May 3, 1981, thirteen days after the report had been completed and only four days before his sentencing hearing, Kovic obtained employment. Under these circumstances we hold that the presentence report was not inaccurate because neither courts nor defendants can reasonably expect that a presentence report can be prepared, dictated, typed and presented to the court contemporaneous with the sentencing hearing. Rather, it is incumbent upon counsel to examine and review the report with their clients and notify the court at the sentencing hearing of the defendant's changed circumstances, if any. Any inaccurate

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[11] *continued*

not complain of a rule violation as such, under § 2255, but only of a violation of his due process rights. *See Johnson v. United States*, 805 F.2d 1284, 1287 (7th Cir. 1986). Thus, we limit our review to Kovic's due process claim.

employment information included in Kovic's presentence report as of May 7, 1981, the date of the sentencing, is there because of the defendant's and/or his counsel's failure to object; and not due to the fault of the trial court[12] or the U.S. Probation Department.

We are aware that Kovic contends that he reviewed the presentence report for the first time in March 1985, at

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[12] We noted that Kovic's § 2255 petition alleged that the trial court, prior to sentencing, did not afford Kovic and/or his counsel an opportunity to comment as to the accuracy of the presentence report but that Kovic no longer pursues this issue on appeal. *Supra*, note 6. The sentencing transcript disclosed that Judge Getzendanner posed the following question to defense counsel:

> "First let me inquire of defense counsel whether you have each had an opportunity to review the presentence report with respect to your client? Has anybody not had that opportunity? All right."

Inasmuch as defendant's counsel knowingly chose not to verbally respond to the court's inquiry, his failure to respond, as much as any direct response, convinces us that counsel had an opportunity to review the presentence investigation report.

We note only that the record discloses that Kovic's initial assertion that the judge failed to comply with Rule 32(c)(3) was based on a partial transcript of the May 7, 1981 sentencing hearing. The record includes two transcripts of the May 7, 1981 hearing, one complete transcript and a partial transcript. It appears that the complete sentencing transcript was prepared in 1982 presumably at the time of Kovic's direct appeal of his conviction. The partial transcript was prepared in 1983, presumably in connection with the appeal from the court's denial of the Rule 35 motion. The partial transcript did not contain the above-quoted dialogue which had transpired between the convicted defendants, their counsel, and Judge Getzendanner. This court, as well as the district court, had every right to expect and does expect the highest degree of professional conduct from each and every attorney appearing before it. Reliance on a partial transcript under these circumstances manifests either incompetence, carelessness or an attempt to mislead the court, any one of which falls far short of acceptable professional conduct. We, of course, made the effort to retrieve and thus rely upon only the complete transcript of the May 7, 1981 sentencing hearing for our factual analysis.

which time he became aware of the "inaccuracies" in the report. Kovic asserts that his failure to timely object to the "inaccuracies" was a result of ineffective assistance of counsel. Kovic argues that but for the ineffective assistance of counsel the presentence report would not contain the "inaccurate" information. Therefore, we proceed, assuming arguendo, that Judge Getzendanner correctly found that Kovic's presentence report contained two inaccurate statements: (1) a 1948 robbery arrest, and (2) he was unemployed when sentenced.

Kovic, however, completely and utterly fails to prove that Judge Getzendanner relied on the alleged inaccuracies. As we will demonstrate, Kovic failed to establish that "it is 'not improbable that the trial judge was influenced by improper factors in imposing sentence.' " *Rizzo v. United States*, No. 85-1984, slip op. at 6 (7th Cir. June 2, 1987) (quoting *United States v. Harris*, 558 F.2d 366, 374-75 (7th Cir. 1977)).

We begin our analysis of whether Judge Getzendanner relied on inaccurate information in the presentence report in imposing Kovic's sentence with her September 18, 1986 Memorandum Opinion and Order denying Kovic's § 2255 motion. She remarked:

> "There were two erroneous statements contained in the presentence report. The correct facts are that the defendant was not arrested in 1948 for robbery and he was employed at the time of sentencing. The court did not take an arrest in 1948 into account in determining the defendant's sentence. The court does not rely on arrests, only actual convictions or in some cases formal indictments. The defendant's lack of employment also was not taken into account. The defendant was caring for an ill, aged parent, and this fact adequately would have explained the defendant's unemployment. In sum, the court was not influenced by the erroneous information."

Kovic argues that this statement of the presiding judge is unreliable because it was made some five years after

the date of sentencing. He baldly makes this assertion without any support in the record. Furthermore, Kovic argues that because the report reflected that he was unemployed at the time of sentencing, the court failed to consider his actual employment as a mitigating factor in imposing sentence.

Kovic directs our attention to *United States v. Espinoza*, 481 F.2d 553 (5th Cir. 1973), to support his argument. In *Espinoza*, the sentencing court stated:

> "One of the defendants has been in trouble before, but they are all a part of what seems to be a very serious problem, and whether they have ever actually been convicted or not, Mr. Espinoza, your record is bad, your record for threats and assaults."

Id. at 554. This statement followed defense counsel's denial that the defendant had ever been convicted of a felony. Espinoza filed a petition for reduction of sentence pursuant to Rule 35 requesting an opportunity to present evidence to rebut the court's statement that the defendant's record was bad. The court denied the motion without allowing the defendant to rebut the contested information. On appeal, the Fifth Circuit noted that:

> "From the record in this case, it is readily apparent that the court below relied, at least in part, on appellant's 'bad record' when assessing appellant a longer sentence than his co-defendants, both of whom were charged with considerably more than appellant."

Id. at 555. The court concluded that the district court had erred because it failed to allow the defendant to present rebuttal information. In reaching this conclusion, the court noted:

> "Had the court below stated reasons for denial of the [Rule 35] motion or, in the alternative, disclosed in some greater detail the basis for imposing the rather long sentence, the posture of this appeal might well be different. Rather, we are faced with a disturbing record that discloses only that defendant was given

> a lengthy sentence on the basis of possibly erroneous information and that the district court, without stating reasons, refused to permit rebuttal of the factual assumption."

Id. at 557-58.

The holding in *Espinoza* is of no assistance to Kovic's cause. After scrutinizing the record, we have not found a scintilla of evidence other than Kovic's unsupported speculation, that would support the defendant's allegation that Judge Getzendanner relied on a 1948 arrest in imposing Kovic's sentence. We note that at the sentencing hearing the Government urged the court to impose a very substantial sentence on Kovic because he was the "*mastermind*" of the brazen phony billing scheme that cost the citizens of Chicago over $600,000 and because of his deliberate and calculated violation of the public trust. The Government noted, and we agree, that substantial sentences and fines will do more than anything we know to discourage and deter public corruption. Judge Getzendanner, after hearing from defense counsel, commented for the record as follows:

> "Mr. Kovic, I am not going to make a speech. I find the crime of which you are convicted before me to be a very serious crime against the public. I am taking into account the recommendations of the other judges on the sentencing council. I have taken into account the probation department's recommendations, the Government's recommendation, your counsel's argument on your behalf, and I sentence you to a period of 20 years and a maximum fine of $27,000.

It should be noted that Judge Getzendanner did not specifically mention the inaccurate information concerning a 1948 arrest for robbery but does refer to Kovic's "serious crime against the public" during her remarks at sentencing. Nor did she comment on the defendant's unemployment. Subsequently, at Kovic's Rule 35 motion, Judge Getzendanner reaffirmed that Kovic's sentence was carefully considered when imposed. She explained that she im-

posed a lengthy sentence because of the extent of Kovic's corruption and her belief that similar activity can be deterred by substantial sentences. Kovic's reliance on *Espinoza* is nothing more than a strawman argument because the facts before us are clearly distinguishable from *Espinoza*. Here it is most evident that Judge Getzendanner did not rely on Kovic's "bad record" as she stated, as contrasted to the judge in *Espinoza*. Furthermore, she specifically delineated her reasoning when imposing the sentence, i.e., to punish and deter public corruption.

We have held that a district court may dismiss a § 2255 motion if he or she recollects that at the time of sentencing he or she did not rely on the void conviction. *See Lawary v. United States*, 599 F.2d 218 (7th Cir. 1979); *see also United States v. Hubbard*, 618 F.2d 422 (7th Cir. 1979). This rule is even more applicable here, where Judge Getzendanner stated with specificity when denying the defendant's § 2255 motion that at the sentencing on May 7, 1981, she did not rely on the inaccurate arrest information contained in the presentence report. *See, e.g., Johnson v. United States*, 805 F.2d 1284, 1289 (7th Cir. 1986). In *Johnson*, the defendant's presentence investigation report contained, *inter alia*, a listing of prior arrests and a charge not on his record. The judge one year later at a § 2255 hearing, denied that he relied on any of the alleged misinformation. We noted that where there was no factual basis for the defendant's claim that the judge relied on false information "[w]e have no basis for discrediting his unequivocal report of his recollections, which persuade us that he did not in fact rely on inaccurate information in sentencing Johnson." *Id.* at 1289. Similarly, Judge Getzendanner emphatically denied reliance on any of the inaccurate information referred to. In her Memorandum Opinion and Order denying Kovic's § 2255 motion she specifically and unequivocally stated:

> "The court did not take an arrest in 1948 into account in determining the defendant's sentence. The court does not rely on arrests, only actual convictions or in some cases formal indictments. The defendant's

> lack of employment also was not taken into account. The defendant was caring for an ill, aged parent, and this fact adequately would have explained the defendant's unemployment. In sum, the court was not influenced by the erroneous information."

Judge Getzendanner is a responsible and respected federal judge aware of her obligations and oath of office, and furthermore, is sensitive to the rights of all individuals. There is nothing in this record, absent Kovic's bald unsupported speculation, to discredit her specific recollection of the sentencing hearing.

In concluding, we note that the facts before us are distinguishable from those in *Rizzo v. United States*, No. 85-1984 (7th Cir. June 2, 1987). In *Rizzo*, the presentence report noted the defendant's previous record of juvenile delinquency adjudications.[13] However, the defendant had not been represented by counsel in the juvenile delinquency proceedings—a violation of his sixth amendment right to counsel. In sentencing the defendant, the court commented: "Mr. Rizzo, your conduct and your *record* commends you for nothing." *Id.*, slip op. at 6 (emphasis added). Because the court expressly noted the defendant's "record" we held that the judge may have impermissibly relied on the uncounselled juvenile adjudications included in the presentence report when imposing sentence. *Id.* As noted above, the record demonstrates that Judge Getzendanner emphatically stated that she did not rely on the inaccurate information set forth in Kovic's presentence investigation report.

We hold that Kovic's due process rights were not violated because the district court did not rely on the inaccurate statements in his presentence report when imposing

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[13] We have noted that district courts are allowed to consider the defendant's juvenile record, *see United States v. Madison*, 689 F.2d 1300, 1315 (7th Cir. 1982), as well as the defendant's criminal record in general, *see, e.g., United States v. Hoffman*, 806 F.2d 703, 714 (7th Cir. 1986), when imposing sentence.

sentence. Kovic has failed to demonstrate that he suffered actual prejudice as a result of the errors in his presentence report and is not entitled to collateral relief.

B.

Kovic also asserts that his constitutional rights were violated because the court attempted to coerce him into cooperating with the Government to provide the identity of the "man downtown." Kovic claims he faced a classic "Hobson's choice"—he could be uncooperative by remaining silent and lose the opportunity to receive leniency or he could cooperate by identifying the "man downtown" and face the risk of additional prosecution.[14] Once more speculating, without a scintilla of support in the record, Kovic contends that in remaining silent, thus preserving his Fifth Amendment rights, he received a longer sentence. Kovic contends that a price tag was impermissibly placed on his constitutional rights. We find Kovic's argument, seemingly ingenious, to be without substance and of no benefit to his cause.[15]

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[14] Kovic also argues that if he would have cooperated by identifying the man downtown, he would in fact have been electing to forego his post-conviction remedies. At the sentencing hearing, Kovic maintained that he was innocent so he may have, by identifying the "man downtown", waived certain issues on appeal, because implicit in identifying the man downtown is his own involvement in the scheme and an admission of guilt to some if not all of the counts for which he was indicted.

[15] As we have noted in footnote 12, Kovic's § 2255 motion relied on a partial transcript of the sentencing hearing for factual support. Kovic based, in part, his present assertion that he was coerced by Judge Getzendanner to cooperate with the Government on statements found in the partial transcript. That partial transcript reads as follows:

The Court:	Does Mr. Kovic wish to address the court?
Mr. Kovic:	No, your Honor.
The Court:	Do you wish to reply to what he said?
Mr. Kovic:	No, your Honor, I think the Court has heard the evidence.

(Footnote continued on following page)

The Government and Kovic state that this issue was initially raised in the § 2255 petition and subject to the *Norris* standard. Kovic argues cause for his procedural defaults exists because his prior counsel were ineffective in either failing to preserve the error at the sentencing hearing or raising it subsequently. But our review of the record discloses that the issue of the constitutionality of Kovic's sentence has been previously raised by Kovic at the Rule 35 motion hearing of June 15, 1983.

The following dialogue took place between David Lubell, Kovic's counsel at the time, and Judge Getzendanner.

> MR. LUBELL: [Kovic] admits his guilt, he should be punished for his guilt but he can't be punished I would respectfully submit—or let me rephrase that, and only Your Honor can answer it. And the question

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[15] *continued*

From this Kovic argued in his § 2255 motion that: "The court *inquired directly from the petitioner* whether he wished to respond to the governments [sic] attorneys' [sic] dialogue that had described to the court the governments [sic] non-productive efforts to have the petitioner cooperate." (Emphasis added).

However, the full transcript of the sentencing hearing reads as follows:

The Court:	Does Mr. Kovic wish to address the Court?
Mr. Kovic:	No.
Mr. Schipper:	No, your Honor.
Mr. Tarum: (Representing the Government)	Do you wish us to—
The Court:	Do you wish to reply?

Judge Getzendanner did not at any time pressure Kovic to respond to the Government's sentencing remarks. Counsel once again, either incompetently or carelessly, relied on the partial transcript and confused the issues before the court. Now apparently relying on the complete transcript, he continues to assert, almost frivolously, that Judge Getzendanner's conduct violated Kovic's constitutional rights.

I would put is this, most respectfully: If one day—never mind an extra eight years—if but one day of the sentence that this court imposed was imposed because of the fact that the defendant did not cooperate, you may want to consider whether that is constitutional or not. Because in point of fact—

THE COURT: Oh it is not even an issue. I said at the time that it wasn't an issue, I have said it a thousand times since then in other cases.

My sentencing philosophy, which was formed quite early, is that the failure to cooperate should not be taken into account; cooperation should be taken into account in a very positive way, and I do that. I have reduced sentences in this case for defendants who have cooperated, and I realize that that tends to benefit people who are possibly more guilty than other people, people who have something that they can cooperate with respect to, but you can't eliminate that unevenness.

So, sentences have been reduced in this case based on affirmative cooperation.

MR. LUBELL: Well, of course I was asking the question from the opposite perspective, and your Honor has already answered that not one extra day was imposed upon this defendant by reason of his failure to cooperate, whether he could or not, because we both agree then that not until the last glimmer has been extinguished of reasonable doubt, of course, could he be punished under

our law for anything other than the crimes that he was convicted of. But—

THE COURT: It is really not an issue.

MR. LUBELL: I beg your pardon?

THE COURT: I say it is really not an issue.

MR. LUBELL: Not an issue.

Counsel clearly raised the issue of whether Kovic's constitutional rights had been violated by his failure to cooperate. Furthermore, counsel clearly challenged the court as to whether Kovic's sentence was lengthened because of his failure to cooperate. While Lubell's argument was not phrased in the same vein as Kovic now raises the issue, there is no doubt that he is raising the same issue.

David Lubell did not raise the issue on his appeal from the Rule 35 motion. We have noted that there is a well recognized rule that a § 2255 motion may not be used as a substitute for a direct appeal. *See Levine v. United States*, 430 F.2d 641, 643 (7th Cir. 1970); *see also Norris v. United States*, 687 F.2d 899 (7th Cir. 1982). We have also noted that "[i]n the absence of changed circumstances we will not reconsider in an appeal from the denial of a section 2255 motion an issue previously decided by us on direct appeal from the conviction." *Norris*, 687 F.2d at 900. Consistent with our precedent we hold that absent changed circumstances an issue heard on a Rule 35 motion but not directly appealed cannot be raised in a subsequent § 2255 motion. Kovic has failed to establish changed circumstances and is not entitled to collateral relief.

Even if we were to consider this issue, assuming, of course, that Kovic had or could have established cause for the procedural defaults, we would affirm Judge Getzendanner. The record conclusively demonstrates that Kovic's sentence was imposed because at the time of sentencing he was the unrepentant "kingpin" of a massive fraud on the public, the citizens of Chicago, and had flagrantly violated his position of public trust. At the May 7, 1981 sentencing hearing, Judge Getzendanner remarked:

> "Mr. Kovic, I am not going to make a speech. I find the crime of which you are convicted before me to be a very serious crime against the public."

Additionally, at Kovic's June 15, 1983 Rule 35 motion, Judge Getzendanner stated:

> "The 20-year sentence was very carefully considered. I have received a lot of comments about that sentence from a lot of different kinds of people.
>
> Obviously Mr. Kovic's friends who have written me letters consider it a very harsh sentence. I suspect that they have no idea as to how much money was involved, how many years were involved, the extent of Mr. Kovic's corruption, the corruption of the entire department; not only the money he took, but the money that everybody below him took is all attributable to him. It would not have occurred unless the boss was on the take also. Affirmative theft from the taxpayers of the City over a long period of time.
>
> It is a very serious crime. If more judges imposed 20-year sentences there would be less of this kind of activity, and I think 20-year sentences are going to become more common in those kinds of cases. . . .
>
> This is the kind of activity that can be deterred by high sentences."

Furthermore, while our review of the record revealed that Judge Getzendanner inquired of the Government as to the defendant's cooperation with the "man downtown," the record is clear that Kovic's sentence was not imposed because he failed to cooperate. Judge Getzendanner clearly articulated her sentencing philosophy at the June 15, 1983 hearing:

> "My sentencing philosophy, which was formed quite early, is that the failure to cooperate should not be taken into account, cooperation should be taken into account in a very positive way, and I do that. I have reduced sentences in this case for defendants who have cooperated, and I realize that that tends to ben-

> efit people who are possibly more guilty than other people, people who have something that they can cooperate with respect to, but you can't eliminate that unevenness."[16]

Kovic was not punished for not cooperating nor was he asked to bargain away his constitutional rights to obtain leniency. As the mastermind of a substantial fraud he received a proportionately substantial sentence.

Furthermore, *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966), on which Kovic relies, is clearly distinguishable. In *Thomas*, the Fifth Circuit held that the sentencing court impermissibly threatened the defendant when it stated:

> "If you will come clean and make a clean breast of this thing for once and for all, the court will take that into account in the length of sentence to be imposed. If you persist, however, in your denial, as you did a moment ago, that you participated in this robbery, the court also must take that into account. Now which will it be?"

Id. at 946. Judge Getzendanner did not at any time promise to reduce Kovic's sentence if he identified the "man downtown" nor did she threaten him if he chose to remain silent. There is no support in the record for Kovic's claim; it is clearly without merit.

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[16] This statement is consistent with Judge Getzendanner's remarks made at the May 7, 1981 sentencing hearing. There she stated with respect to Mr. Cavale, Kovic's co-defendant, that:

> "It clearly is a puzzle as to how the Court can put one co-owner [Mr. Nawrocki] on two years' probation and give a period of incarceration to another co-owner, [Mr. Cavale,] but it is *not punitive* with respect to Mr. Cavale, it is really to *credit Mr. Nawrocki's cooperation* with the government."

Clearly, Judge Getzendanner did not punish any of the defendants for not cooperating with the Government.

III

Kovic's remaining claims are also without merit. Initially, Kovic asserts that his prior counsel provided ineffective assistance of counsel. While Kovic provides an endless list of alleged deficiencies, essentially what his claim boils down to is that his prior counsel failed to raise and preserve the issues already discussed above. Because we have held that Kovic suffered no actual prejudice from failing to previously raise the issues he cannot now suffer prejudice from his prior counsel's alleged deficiencies with respect to the same said errors. *See Johnson v. United States*, 805 F.2d 1284, 1290 (7th Cir. 1986).

Next, Kovic contends that even if we hold, as we do, that Judge Getzendanner did not rely on the inaccurate information, she still abused her discretion in imposing the 20-year sentence. On appeal from the Rule 35 motion, we held that: "There is no basis upon which we can say that the district court abused its discretion in denying the Rule 35 motion."[17] We will not now reconsider our previous holding.

Finally, Kovic asserts that the district court abused its discretion because it failed to order an evidentiary hearing pursuant to § 2255. The standard for determining when a § 2255 motion can be denied without an evidentiary hearing is whether the record conclusively demonstrates that a defendant is entitled to no relief. *See United States v. Robinson*, 585 F.2d 274, 280 (7th Cir. 1978), *cert. denied*, 441 U.S. 947 (1979). Because we hold the record before us conclusively demonstrates that Kovic is entitled to no relief, we find no basis for holding that the district court abused its discretion.

Kovic insists that because the two inaccurate statements remain in his presentence report he may suffer prejudice in the future by being denied an early parole. We recently stated that "Section 2255 provides the procedure for challenging federal convictions and sentences; if a prisoner

[17] *United States v. Kovic*, No. 83-2296, unpublished order at 6 (7th Cir. July 23, 1984).

wants 'out' for some other reason his remedy [after exhausting his administrative remedies], is habeas corpus." *United States v. Mittelsteadt*, 790 F.2d 39, 40-1 (7th Cir. 1986). But we feel obligated to point out to Kovic's counsel that he is free to informally bring the matter to the attention of the parole authorities, and we are convinced that the Parole Commission, if asked to do so, would honor Judge Getzendanner's findings of fact.

In reaching our decision affirming the district court, we are mindful of the need for finality of criminal convictions. This case has been dragged out over six years while the "mastermind" of this extensive fraud on the citizens of Chicago appealed his conviction, challenged his sentence pursuant to Rule 35, appealed from the denial of the Rule 35 motion, then sought collateral relief pursuant to § 2255, and now, once again before this court, he contests his sentence on what can be at best characterized as purely trifling and speculative assertions of alleged errors by the trial court and his prior counsel. All too often, as we are seeing in this case, the defense counsel takes a buckshot approach hoping a pellet will strike—but instead, our overburdened judicial system has been put through yet another needlessly repetitious and wasteful collateral attack. Some place, somewhere, somehow, we must put an end to this repetitious and meritless litigation if we are to be able to attempt to render justice in a timely fashion to those with meritorious claims.

WE AFFIRM.

RIPPLE, *Circuit Judge*. I concur in the result.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITES STATES OF AMERICA,	)	
	)	
v.	)	No. 86 C 3834
	)	
ANTHONY KOVIC	)	

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge

This petition to vacate, set aside or correct sentence pursuant to 28 U.S.C. §2255 is brought by Anthony Kovic, originally sentenced by the court on May 7, 1981, to twenty years imprisonment. Several grounds are raised.

There were two erroneous statements contained in the presentence report. The correct facts are that the defendant was not arrested in 1948 for robbery and he was employed at the time of sentencing. The court did not take an arrest in 1948

into account in determining the defendant's sentence. The court does not rely on arrests, only actual convictions or in some cases formal indictments. The defendant's lack of employment also was not taken into account. The defendant was caring for an ill, aged parent, and this fact adequately would have explained the defendant's unemployment. In sum, the court was not influenced by the erroneous information.

At several times during the sentencing hearing involving the co-defendants, errors in various presentence reports were discussed and argued by various counsel. The court noted that it was important that errors in presentence reports should be corrected. (Tr. at 76). (References are to the government's transcript). Mr. Kovic and his counsel had every

opportunity to correct any misstatement of fact in the presentence report.

At the sentencing hearing there were remarks on two occasions about information contained in other presentence reports. The court had read and considered the presentence reports of the co-defendants who also were sentenced on the same day. Those reports are confidential and co-defendants are not allowed to read the presentence reports of each other. None of the information was discussed on the record and there is no indication in the record that any of that information was taken into account by the court in sentencing Mr. Kovic. If certain of the co-defendants made statements in their presentence reports implicating Mr. Kovic, that would have been irrelevant since the court was convinced of Mr. Kovic's guilt based on the evidence at trial. The court

informed the parties at the sentencing that the court was convinced of Mr. Kovic's guilt and that had Mr. Kovic testified to his innocence, that testimony ultimately would have been disbelieved by the court. Any confirmatory statements by co-defendants after the trial would have been surplusage and not relied upon by the court.

The defendant complains that the court did not state on the record whether any letters of recommendation had been received and relied upon by the court. At one point, the court noted that with respect to Mr. Faul, one of the co-defendants, eight letters of recommendation (or more accurately condemnation) had been received and Faul's counsel stated that he had not seen those letters. This would allow an inference that letters could have been

received by the court on Mr. Kovic and not disclosed to trial counsel. THe court, however, has checked Mr. Kovic's file and finds no letters. The presentence report reflects that the defendant had presented several letters of reference to the probation department and that those letters had been sent to the court. Undoubtedly those letters were read by the court. The court recalls no other letters.

Next the defendant complains that the court failed to insure that the defendant had reasonable time to review his presentence report before sentencing, citing United States v. Rone, 743 F.2d 1169 (7th Cir. 1984). Rone was decided under Rule 32 of the F.R.Cr.P. as amended in 1983. Rule 32 as in effect at the time of Mr. Kovic's sentencing only required that the defendant or defense counsel be given the opportunity to read

the presentence report. The court asked defense counsel for all defendants if they had had an opportunity to review the presentence report with respect to his client. (Tr. at 7). No one responded that he had not had such an opportunity. It was clear from the argument of Mr. Kovic's counsel that he had read Mr. Kovic's presentence report. (E.g., Tr. at 23).

The defendant complains that he was not given an opportunity to address the court. The court inquired whether Mr. Kovic wanted to address the court and both Mr. Kovic and his lawyer stated that he did not. (Tr. at 27). The transcript submitted by the defendant as Exhibit 3, at p. 12, is slightly different from the transcript attached to the government's responsive memorandum. The defendant's transcript reads as follows (at page 12):

> The Court: Does Mr. Kovic wish to address the Court.

Mr. Kovic: No, your Honor.

The Court: Do you wish to reply to what he said?

Mr. Kovic: No, your Honor, I think the Court has heard the evidence.

The government's transcript reads as follows (at pp. 27-28):

The Court: Does Mr. Kovic wish to address the Court.

Mr. Kovic: No

Mr. Schippers: No, your Honor.

Mr. Tarun (the prosecutor): Do you wish us to --

The Court: Do you wish to reply?

Mr. Tarun: No, your Honor. I think the Court has heard the evidence.

The government's transcript was prepared in 1982, presumably in connection with the first appeal. The defendant's transcript was prepared in 1984, presumably in connection with the appeal from the court's denial of the motion to reduce. Both appear to be official transcript. Although there are differences, both transcripts show that

the court inquired whether the defendant wished to speak and the defendant personally answered that he did not. It seems clear that the court was addressing the defendant personally since the defendant personally responded.

In the defendant's memorandum in support of his motion, he states that "The government has conceded that the procedure at sentencing was defective for lack of allocution, thus requiring a remand." (Memorandum in Support at 6). The government has made no such concession in this case. (Government's Response at 6).

Defendant's next arguments are based on the court's concern about "the man downtown." There was evidence at trial that Mr. Kovic stated that he had to pay of "the man downtown." At the sentencing hearing the court first raised that evidence and asked the government if it

had conducted an investigation to determine the identity of the man downtown. The prosecutor responded that only one man, Kovic, could confirm or deny the existence of the man downtown, but that from the scope of the corruption involved in the case, it was his surmise that Kovic had to share some of the profits with someone else. (Tr. 17-18). Next the court inquired whether Mr. Kovic had been given the opportunity to cooperate with respect to the man downtown and there was a dispute between defense counsel and the prosecutor as to whether that opportunity had been extended. Since the court takes cooperation with the government into account in an affirmative way, it was important to the court that the defendant at least have been given the opportunity to cooperate with respect to the question of payoffs to a third party. (Tr. at

19-20). All of this was an area of legitimate inquiry for the court.

The court then heard from defense counsel, who himself raised the issue of the man downtown, arguing that the government had failed to conduct an investigation into the City's Purchasing Department. (Tr. at 21-22). Later defense counsel further argued that policemen were scapegoats for corrupt politicians: "As long as [politicians] have a policeman out in front of them, somebody that they can throw to the dogs in the courtrooms and somebody who can be given substantial sentences and satisfy the public, they can continue with their operations." (Tr. at 24). To which argument the court properly responded: "But it is only your client, according to the evidence that I heard, only your client who could identify that politician." (Tr. at 24). I don't think

this statement constitutes a demand by the court that the defendant identify the man downtown. It is merely a response to counsel's argument about the role of politicians who go unpunished in public corruption cases.

Defense counsel again raised the subject of the man downtown and engaged the court in discussion. (Tr. at 26). The court never raised the subject on its own initiative beyond its initial questions. Against this background, the defendant's arguments are frivolous. The court did not join forces with the government to force the defendant to cooperate. The court did not force the defendant into silence, thereby depriving him of his right to allocution. The defendant was not being asked to bargain away his constitutional rights to obtain leniency.

The defendant also now argues that his trial counsel was ineffective in connection with the sentencing proceeding, and that his next counsel who presented and argued the motion to reduce was ineffective. Both lawyers did competent work on the defendant's behalf. There is no showing of ineffective assistance of counsel.

The defendant failed to raise any of these issues on either of his appeals and in his present petition he fails to show cause as to why these issues were not raised on appeal and actual prejudice due to the failure to raise them on appeal. For this reason alone, the petition must be denied. Norris v. United States, 687 F.2d 899 (7th Cir. 1982); United States v/ Carnell, 716 F.2d 479, 481 n.5 (7th Cir. 1983).

For the reasons stated herein, the petition under 28 U.S.C. §2255 is denied. It is so ordered.

Susan Getzendanner

United States District Judge

September 18, 1986

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITES STATES OF AMERICA,	)	JUDGMENT IN A
	)	CIVIL CASE
v.	)	
	)	No. 80 CR 499
ANTHONY KOVIC	)	86 C 3834

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment by dismissal is entered in favor of the respondent and against the petitioner on the petition under 28 U.S.C. §2255.

Enter judgment.

September 18, 1986

H. STUART CUNNINGHAM
Clerk

Barbara J. Brotherson
(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITES STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 86 C 3834
	)	80 CR 499(1)
ANTHONY KOVIC No. 88731-024,	)	Honorable Judge Susan Getzendanner
Defendant.	)	

NOTICE OF APPEAL

NOW COMES the defendant, ANTHONY C. KOVIC, No. 88731-024, by and through his Attorney, MICHAEL R. ABRAMOVIC, and files this Notice of Appeal of the district court's denial of relief under 28 U.S.C. §2255 motion. The Notice of Appeal is filed under the Federal Rules of Criminal Procedure and the United States Constitution. In support thereof, the defendant asserts:

1. The Defendant is currently in the custody of the United States Bureau of Prisons since January 3, 1983. The defendant is presently incarcerated in the hospital facility at the Ft. Worth Federal Correctional Facility.

2. On February 26, 1981, the defendant was convicted by a jury in Criminal Case No. 80 CR 499(1) and received a twenty (20) year sentence on May 7, 1981.

3. The Seventh Circuit affirmed the conviction on September 7, 1982 and a writ of certiorari was denied on February 22, 1983.

4. A Rule 35 Motion was filed on June 16, 1983; the district court denied relief under the Rule 35 Motion on June 23, 1983 and the Seventh Circuit affirmed the trial court's denial of the Rule 35 Motion relief on July 23, 1984.

5. On May 29, 1986, the defendant filed a Motion to Vacate, Set Aside or Correct and Reduce the Twenty (20) Year Sentence under 28 U.S.C. §2255. The government responded and the trial court denied the relief on or about September 18, 1986.

6. The defendant raises the following issues for appeal of the order denying any relief under the 28 U.S.C. Section 2255 motion.

(i) Sentencing judge relied on improper, unreliable information or false information in exercising her discretion in imposing sentence and a convicted defendant has a duty process right to be sentenced on the basis of accurate information.

(ii) The Court coerced defendant to enter into the Plea Bargaining Process with the government in open court on the date set for defendant's

sentencing and pressured defendant to cooperate with the government to provide the identity of the man designated as the "man downtown" which was prohibited by Federal Criminal Procedure 11(e)(1).

(iii) The Courts coerced defendant to waive his constitutional privilege against self-incrimination and right to appeal his convictions by requesting he speak as to the identity of the "man downtown" and was a violation of defendant's due process rights and received a harsher sentence for exercising his constitutional rights.

(iv) The government's actions constituted prosecutorial misconduct in its efforts to pressure the defendant to enter into a Plea Agreement in open court on the date sentence was imposed and the date of the Rule 35 Motion.

(v) Defendant was deprived of effective assistance of counsel prior to

and on the date sentence was imposed and through the appeal process.

(vi) Defendant was deprived of the effective assistance of counsel on or before the presentation of the Rule 35 Motion and on appeal of the Rule 35 denial relief.

(vii) Plea of leniency due to the continued deterioration of defendant's health conditions as evidenced by defendant's transfer to new medical facilities in Bureau of Prisons, equipped to provide better medical treatment of defendant.

(viii) The district court's failure to provide an evidentiary hearing under 28 U.S.C. Section 2255 Motion violated defendant's constitutional rights, was against the manifest weight of the evidence, and an abuse of discretion. The petition contained sufficient facts to support his claims. The files and records

before the district court did not contradict the defendant's factual claims. The factual claims did not represent bald conclusions with no basis for setting aside the sentence, and were not frivolous claims.

(ix) The district court's denial of relief under 28 U.S.C. Section 2255 was against the manifest weight of the evidence.

(x) The district court's denial of relief under 28 U.S.C. Section 2255 was an abuse of discretion.

(xi) Any other issues that demonstrate the defendant's constitutional rights were violated or abrogated.

MICHAEL ABRAMOVIC
Attorney for Defendant

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